

Rule 8, Ariz. R. Crim. P.

SPEEDY TRIAL — Continuances under Rule 8.5, in general — Revised 10/2009

Rule 8.5(a), Ariz. R. Crim. P., allows any party to request a continuance of any proceeding. The rule requires all motions to continue to "be in writing and state with specificity the reason(s) justifying the continuance." Rule 8.5(b) states that for a trial date to be continued, the moving party must make a "showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice." Even when the moving party has shown "extraordinary circumstances," the continuance "may be granted only for so long as is necessary to serve the interests of justice." When a court considers whether to grant a motion for continuance, the court must consider both the defendant's and the victim's "rights to a speedy disposition of the case." Rule 8.5(b). If the court grants a continuance, the court must state "the specific reasons for the continuance on the record." *Id.* Rule 8.5(c) provides, "No further continuances shall be granted except as provided in Rules 8.1(e)¹, 8.2(e)² and 8.4(d)³."

The appellate courts rarely reverse cases based on a trial court's decision to grant or deny a motion to continue. As the Arizona Supreme Court has stated:

The grant of a continuance is an exercise of the sound discretion of the trial court. *State v. Amarillas*, 141 Ariz. 620, 622, 688 P.2d 628, 630 (1984), *citing State v. Sullivan*, 130 Ariz. 213, 635 P.2d 501 (1981). Further, the trial court's denial of a motion for continuance will not be disturbed unless (1) the trial

¹ Rule 8.1(e) explains the procedures used for cases designated as "extraordinary cases". Such cases are not subject to the time limits outlined in Rule 8.

² Rule 8.2(d) states that time limits for a continuance "may be extended pursuant to Rule 8.5", the rule pertaining to motions to continue. Thus, when continuances are granted, the time limits of Rule 8.2 are extended.

³ Rule 8.4(d) provides "delays necessitated by congestion of the trial calendar" are excluded from the Rule 8 time limits in "extraordinary circumstances" and when the presiding judge has applied to the Arizona Supreme Court for suspension of the Rules of Criminal Procedure.

court clearly abused its discretion in denying the motion, and (2) prejudice resulted. *Amarillas*, 141 Ariz. at 622, 688 P.2d at 630.

In *State v. Atwood*, the defense argued that the trial court abused its discretion by denying the defense's motion to continue to question certain prosecution witnesses before trial began. 171 Ariz. 576, 620, 832 P.2d 593, 637 (1992), cert. denied 506 U.S. 1084 (1993). The Arizona Supreme Court disagreed, noting that the trial court had allowed the defense to interview each witness before he or she testified, even if it meant recessing the trial to do so. The Court noted that "interviewing witnesses in the course of trial certainly is not the most desirable procedure," but stated, "we will not second guess the trial court's decision in this matter." *Id.*

It is clear that "the grant or denial of a continuance should generally be disturbed only upon a showing of a clear abuse of discretion and prejudice to defendant." *State v. Garcia-Contreras*, 191 Ariz. 144, 149 ¶ 21, 953 P.2d 536, 541 ¶ 21 (1998); accord, *State v. Vasko*, 193 Ariz. 142, 144 ¶ 8, 971 P.2d 189 ¶ 8 (App. 1999). *Garcia-Contreras* is one of the rare cases in which an appellate court reversed a defendant's conviction based on the trial court's failure to grant the defendant's motion for a continuance. In that case, the defendant's civilian clothes had not arrived at the courthouse when it was time to select the jury. The trial court denied defense counsel's motion for a continuance. The Arizona Supreme Court stated:

It is plain that the trial court's refusal to grant a continuance forced the defendant to choose between two equally objectionable alternatives. He could either have appeared before the jury in prison attire, jeopardizing his Fourteenth Amendment guarantee of presumptive innocence, or sacrificed his Sixth Amendment right to be present at jury selection. Faced with this dilemma, and upon advice of counsel, defendant "chose" not to be present.

State v. Garcia-Contreras, 191 Ariz. 144, 146 ¶ 7, 953 P.2d 536, 538 ¶ 7 (1998). The Court concluded that the defendant was effectively excluded from the entire jury selection

process; found that excluding the defendant from jury selection was "structural error;" and required reversal without any need to show prejudice. *Id.* at 149 ¶ 22, 953 P.2d at 541 ¶ 22.

When a continuance is sought because a witness is absent, "Rule 8 does require more than just a mere allegation of a witness's unavailability to justify a continuance on that basis." *State v. Vasko*, 193 Ariz. 142, 145 ¶ 14, 971 P.2d 189, 192 ¶ 14 (App. 1998). "A trial court's denial of a motion to continue for the purpose of securing the presence of a witness will not be disturbed absent an abuse of discretion and resulting prejudice. *State v. Amarillas*, 141 Ariz. 620, 688 P.2d 628 (1984); *State v. Foster*, 121 Ariz. 287, 589 P.2d 1319 (1978)." *State v. Jackson*, 157 Ariz. 589, 760 P.2d 589, 593 (App. 1988). In *State v. Foster*, the Court of Appeals adopted a list of factors that the trial court should consider in deciding whether to grant or deny a motion for continuance to secure the presence of a witness:

1. Whether the testimony is material to the case.
2. Whether the testimony can be elicited from another source.
3. Whether the testimony is cumulative.
4. Probability of securing the absent witness in a reasonable time.
5. Whether the requesting party was diligent and acting in good faith.
6. The inconvenience to the court and/or others.
7. The likelihood that the testimony would have affected the jury's verdict.

121 Ariz. 287, 589 P.2d 1319 (1978).⁴

⁴ These factors were originally stated by the Alaska Supreme Court in *Klockenbrink v. Alaska*, 472 P.2d 958 (1970).

In *State v. Willoughby*, the Arizona Supreme Court upheld the trial court's decision to deny a continuance of the sentencing hearing because the evidence would be cumulative. 181 Ariz. 530, 892 P.2d 1319 (1995), *cert. denied*, 516 U.S. 1054 (1995). Because *Willoughby* was a death penalty case, the defense had already requested and received several continuances before the sentencing hearing started, as well as presented 17 mitigation witnesses. After the defense's witnesses testified, the court ordered a continuance for a psychological examination of the defendant. On the date the court reconvened the sentencing to examine the psychologist's report, the defense moved for another continuance, stating his intention to talk with the psychologist and call him as his final witness. The court granted a final continuance over the State's objection but told the parties that the sentencing would definitely conclude on the new date. However, on that date defense counsel said he was not prepared to proceed with sentencing and again asked for a continuance. The trial court said that if the only other proposed defense witnesses were "like the many people that you produced in the two days of our previous session, I would think it would be unnecessary to produce more of the same." *Id.* at 547, 892 P.2d at 1336. Defense counsel said that the other witnesses he intended to call "would not be raising or bringing up any new issues that had not been previously raised." *Id.* The trial court then proceeded with sentencing and imposed the death penalty. On appeal, the defendant argued that the trial court abused its discretion in refusing to grant a continuance to present additional mitigating evidence. The Arizona Supreme Court disagreed:

The judge had already granted several continuances, which delayed sentencing for more than five months after the jury verdict, and had heard seventeen mitigation witnesses. It was well within the court's discretion to deny a further continuance for cumulative evidence, especially when counsel knew that the judge intended to proceed with sentencing that day. The court did not abuse its discretion in denying a continuance.

Id.

Similarly, in *State v. Cook*, 170 Ariz. 40, 56, 821 P.2d 731, 747 (1991), *cert. denied* 506 U.S. 846 (1992), the Arizona Supreme Court upheld the trial court's denial of a motion to continue to secure the testimony of two witnesses on the grounds that the witnesses' testimony would be irrelevant or cumulative. *See also State v. [Michael] Apelt*, 176 Ariz. 349, 861 P.2d 634 (1993), *cert. denied* 513 U.S. 834 (1994), [trial court denied a motion to pay for defense counsel to travel to Germany in search of mitigating evidence, in absence of any showing that the trip was necessary]. *But see State v. Eastlack*, 180 Ariz. 243, 883 P.2d 999 (1994), *cert. denied* 514 U.S. 1118 (1995), in which the Arizona Supreme Court held that the trial court should have continued the sentencing hearing to allow defense counsel to locate and prepare an expert psychological witness in a capital case.

When a continuance is requested solely to secure the presence of an impeachment witness, the trial court ordinarily denies the continuance. *State v. Jackson*, 112 Ariz. 149, 539 P.2d 906 (1975), *State v. Griffin*, 117 Ariz. 54, 570 P.2d 1067 (1977), *State v. Loyd*, 118 Ariz. 106, 574 P.2d 1325 (1978). In *Griffin*, the Arizona Supreme Court stated, "it is not an abuse of discretion to deny a continuance where the testimony is sought for impeachment purposes only." *Griffin*, 117 Ariz. at 56, 570 P.2d at 1069, *citing State v. Jackson*, 112 Ariz. 149, 539 P.2d 906 (1975).